Amicus Brief

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

LARRY MITCHELL, WARDEN,

Petitioner,

v.

GARY WELSH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF THE STATE OF NEW MEXICO

JEFF BINGAMAN
Attorney General
State of New Mexico
EDDIE MICHAEL GALLEGOS
Assistant Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 982-6933

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BRIEF AMICUS CURIAE OF THE STATE OF NEW MEXICO

THE INTEREST OF THE AMICUS CURIAE

The State of New Mexico wants its Parole Board to have discretion in determining whether to grant, deny or revoke the parole of a state prisoner.

The Parole Board of New Mexico uses the "seriousness of the offense" as part of its criteria in determining if parole is to be granted to a New Mexico state prisoner.

The decision in *Welsh* v. *Mizzell*, 668 F.2d 328 (7th Cir. 1982) threatens the discretionary powers of the New Mexico State Parole Board.

THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS JEOPARDIZES THE DISCRETION OF THE NEW MEXICO PAROLE BOARD TO GRANT PAROLE TO A NEW MEXICO STATE PRISONER

Section 31-22-24 NMSA 1978 (1981 Rep. Pamp) creates the New Mexico Parole Board. Section 31-21-25, B, D, *supra*, grants to the New Mexico Parole Board power to adopt such rules, regulations and criteria as may be necessary for the effectual discharge of its duties in determining whether to grant, deny or revoke parole or to discharge a parolee. The Rules and Regulations of the New Mexico Parole Board lists "seriousness of the offense" as one criteria in determining parole for a prisoner.

Greenholz v. *Inmates of Nebraska Penal Correctional Complex*, 442 U.S. 1 (1979) held, inter alia, that a state need not establish a parole system and that a state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority. Accordingly parole is not a right but an act of clemency. *Greenholz*. *Portley* v. *Grossman*, 444 U.S. 1311 (1980) upheld the discretion of the Federal Parole Commission to change administrative guidelines articulating the factors relied upon in making parole decisions. In *Portley*, at the time the prisoner was eligible for parole, the Parole Commission's guidelines had changed from those in effect at the time the prisoner was sentenced. *Portley* held that such a change did not violate the constitutional prohibition against ex post facto laws. *Weaver* v. *Graham*, 450 U.S. 24 (1981) held that even if a law merely alters penal provisions accorded by the grace of the legislature, it violates the ex post facto clause if it is both retrospective and more onerous that the law in effect on the date of the offense. However, no ex post facto violation occurs if the change was merely procedural and

does not increase the ingredients of the offense or the ultimate facts necessary to establish guilt. *Hopt* v. *Utah*, 110 U.S. 574 (1883); *Weaver*, *supra*. Parole is an extension of the prison walls *Alvarado* v. *McLaughlin*, 486 F.2d 541 (4th Cir. 1973). It follows that parole is merely a procedural or administrative decision of whether to allow a prisoner to serve his sentence either inside or outside the prison walls. Parole changes the location of the sentence but does not change the length.

In *Welsh* v. *Mizzell*, 668 F.2d 328 (7th Cir. 1982) the Illinois Prison Review Board, in denying parole to the prisoner, relied upon parole criteria in effect at the time of parole eligibility rather than at the time of the crime. The newer criteria added "seriousness of the offense" as a factor to be considered. *Welsh* reversed the decision of the United States District Court for the Southern District of Illinois, which dismissed the prisoner's petition for writ of habeas corpus, on the grounds that such a change in parole criteria worked a substantial harm to the prisoner and thus violated the ex post facto clause.

The decision in *Welch* is incorrect for three reasons. First, any changes in parole criteria are procedural in nature because such criteria do not increase the length of a sentence but only the location. Second, such criteria do not increase either the ingredients of the crime for which a prisoner is first sentenced or the sentence and do not change the ultimate fact that the prisoner may not yet be rehabilitated enough to finish his sentence outside the prison walls. Third, the *Walsh* court assumed that the prisoner's "exemplary conduct . . . might well have resulted in parole under the older criteria." *Id.* at 331. This is pure speculation.

CONCLUSION

The decision in *Welsh* v. *Mizzell*, 668 F.2d 328 (7th Cir. 1982) is incorrect because a change of parole criteria does not increase the sentence of a prisoner and does not change the fact that a prisoner may not be rehabilitated enough to be allowed to finish his sentence outside the prison walls.

The decision in *Welsh* jeopardizes the ability of states to establish realistic parole criteria for state prisoners.

This Court should grant the Petition for Writ of Certiorari filed by the State of Illinois.

The decision in *Welsh* should be reversed and the decision of the district court affirmed.

Respectfully submitted,

JEFF BINGAMAN
Attorney General
State of New Mexico
EDDIE MICHAEL GALLEGOS
Assistant Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 982-6939
Attorneys for the Amicus Curiae